GMP Kaisar Security (M) Sdn Bhd lwn Mohamad Amirul Amin bin Mohamed Amir

MAHKAMAH RAYUAN (PUTRAJAYA) — RAYUAN SIVIL NO P-02(NCvC)(W)-1556–08 TAHUN 2019
LAU BEE LAN, ABU BAKAR JAIS DAN GUNALAN MUNIANDY HHMR
30 SEPTEMBER 2021

Tort — Liabiliti vikarius — Majikan — Responden mendakwa perayu bertanggungan secara vikarius terhadap perbuatan salah pekerja — Sama ada perayu bertanggungan secara vikarius terhadap respondent — Sama ada Mahkamah Tinggi adalah betul dalam menentukan jumlah ganti rugi yang perlu dibayar perayu

Defendan pertama ialah pekerja yang diupah atau digajikan oleh perayu ('defendan kedua') berdasarkan kontrak perkhidmatan antara mereka. Defendan kedua telah menugaskan defendan pertama sebagai pengawal keselamatan peribadi kepada seorang individu yang dikenali sebagai Dato' Ong Teik Kwang. Untuk membolehkan defendan pertama melaksanakan tugasnya, defendan kedua telah membekalkan kepada defendan pertama dengan sepucuk pistol automatik. Pada 1 Disember 2016, defendan pertama telah menggunakan pistol tersebut dan menembak mati Dato' Ong Teik Kwang di dalam sebuah kereta. Selepas itu, defendan pertama telah turun dari kereta tersebut sambil melepaskan tembakan terhadap orang-orang awam yang melalui Lebuhraya Tun Dr Lim Chong Eu di Pulau Pinang dan menyebabkan dua orang individu telah meninggal dunia dan empat orang cedera parah. Responden ('plaintif') sedang menunggang motosikal dengan rakannya sebagai pembonceng di tempat kejadian dan beliau ternampak satu kejadian seperti kemalangan jalanraya. Plaintif turun dari motosikalnya dan mendekati seorang individu yang disangka sebagai mangsa kemalangan jalanraya memandangkan badannya berlumuran darah. Mangsa tersebut berada dalam keadaan duduk di atas jalanraya. Defendan pertama sedang berdiri berhadapan dengan mangsa. Plaintif telah bertanya kepada defendan pertama apa yang telah berlaku. Tiba-tiba, defendan pertama telah mengeluarkan senjata api lalu melepaskan satu das tembakan ke bahagian dada plaintif. Plaintif jatuh di atas jalan dan mengalami cedera parah. Defendan pertama telah ditangkap oleh polis dan telah dituduh dengan kesalahan membunuh dan cubaan membunuh. Plaintif yang mengalami kecederaan dan kerugian akibat ditembak oleh defendan pertama mengatakan defendan kedua sebagai majikan defendan pertama adalah bertanggungan secara vikarius terhadap perbuatan salah defendan pertama. Plaintif menuntut ganti rugi am dan khas terhadap defendan kedua. Defendan kedua pula menafikan liabiliti. Pada masa yang

material juga, defendan kedua telah berkontrak dengan sebuah syarikat North Metal Sdn Bhd ('North Metal') untuk menyediakan perkhidmatan pengawal peribadi. Defendan pertama, sebagai pengawal peribadi yang bertauliah telah dipilih sendiri oleh North Metal untuk bertugas dengan mereka. North Metal sendiri yang telah secara khusus menetapkan defendan pertama sebagai pengawal peribadi kepada individu yang ditetapkannya. Hakim Mahkamah Tinggi ('HMT') telah membenarkan tuntutan plaintif terhadap defendan kedua. Oleh itu, rayuan ini oleh perayu.

Diputuskan, menolak rayuan:

(1) **(oleh Abu Bakar Jais HMR, majoriti)** Apabila defendan pertama enggan memberikan apa-apa keterangan di Mahkamah Tinggi, walaupun diberikan peluang untuk berbuat demikian, HMT telah dengan betul menerima keterangan plaintif dan pegawai penyiasat bahawa plaintif telah ditembak oleh defendan pertama. Defendan kedua merupakan majikan defendan pertama dan telah membayar gaji defendan pertama. Defendan kedua juga telah membekalkan pistol tersebut kepada defendan pertama. Dengan itu, tidak benar bahawa tanggungjawab berhati-hati defendan kedua telah berpindah atau diwakilkan kepada North Metal. Oleh itu, defendan kedua tidak seharusnya terlepas dari bertanggungan secara vikarius kerana perbuatan defendan pertama menembak plaintif (lihat perenggan 31 & 33).

(2) **(oleh Abu Bakar Jais HMR, majoriti)** Walaupun tiada perintah dibuat oleh Mahkamah Tinggi terhadap defendan pertama dan plaintif sendiri tidak memohon apa-apa perintah terhadap defendan pertama, ini tidak bermakna defendan kedua tidak boleh didapati bertanggungan secara vikarius. Juga adalah salah untuk dihujahkan bahawa tiada tanggungan boleh dipindahkan dari defendan pertama ke defendan kedua. Tanggungan liabiliti bukan dipindahkan dari defendan pertama ke defendan kedua. Tanggungan liabiliti secara vikarius terhadap defendan kedua sememangnya wujud apabila dibuktikan perbuatan salah defendan pertama iaitu menembak plaintif. Defendan pertama berkerja untuk defendan kedua. Oleh itu defendan pertama bukan kontraktor bebas. Tidak boleh dikatakan perbuatan defendan pertama menembak plaintif adalah di luar skop bidang tugasnya. Sememangnya defendan pertama tidak diperintahkan menembak plaintif tetapi perbuatan menembak itu berlaku adalah berkait rapat dengan kerjanya yang dibekalkan pistol tersebut. Juga tidak boleh dikatakan tiada tanggungan vikarius kerana defendan pertama bertindak secara 'frolic of his own'. Ini kerana perbuatan menembak plaintiff itu adalah berkait dengan tugas defendan pertama dan beliau menggunakan pistol yang dibekalkan kepadanya oleh defendan kedua. Adalah tidak benar untuk dihujahkan bahawa tugas berhati-hati dan tanggung jawab defendan kedua hanya terhadap pemilihan defendan pertama untuk pelanggan-pelanggan

mereka dan bukan pemilihan defendan pertama untuk orang awam. Ini tidak langsung konsisten dengan konsep atau undang-undang liabiliti vikarius. Walaupun jika benar sekalipun bahawa defendan kedua telah berhati-hati apabila berkontrak dengan defendan pertama, ini tidak bermakna tanggungan vikarius tidak boleh dikenakan terhadap defendan kedua. Hujahan bahawa Jabatan Keselamatan Dan Ketenteraman Awam di Kementerian Dalam Negeri telah mendapati bahawa defendan kedua tidak melakukan sebarang kesalahan terhadap insiden menembak plaintif tidak dapat membantu defendan kedua. Ini kerana Jabatan tersebut tidak menimbangkan sama ada defendan kedua bertanggungan secara vikarius atau tidak (lihat perenggan 35–42).

(3) **(oleh Abu Bakar Jais HMR, majoriti)** Tiada kecuaian sumbangan semata-mata kerana plaintif telah bertanya apa yang telah terjadi. Plaintif waktu itu tidak tahu bahawa defendan pertama telah menembak beberapa orang dan tindakan plaintif menanyakan apa yang telah terjadi adalah suatu perbuatan biasa yang boleh dilakukan oleh orang ramai yang prihatin terhadap sesuatu kejadian yang berlaku. HMT telah dengan betulnya mendapati defendan kedua bertanggungan secara vikarius terhadap perbuatan defendan pertama kerana telah memungkiri tugas hati-hati terhadap plaintif dan orang awam (lihat perenggan 43–44).

(4) **(oleh Abu Bakar Jais HMR, majoriti)** HMT adalah betul dalam menentukan jumlah ganti rugi yang perlu dibayar oleh defendan kedua. Bagi ganti rugi am ke atas kecederaan tubuh badan, penemuan fakta-fakta oleh HMT tidak seharusnya diganggu. HMT dengan betul telah membenarkan ganti rugi yang munasabah menurut beliau iaitu RM40,000. Bagi post traumatic stress disorder pula, HMT berhak memberikan jumlah ganti rugi yang munasabah pada pendapat beliau iaitu RM30,000. HMT juga telah dengan betul memberikan ganti rugi khas. Tuntutan plaintif disokong oleh sijil cuti sakit dan keterangan lisan dari majikan beliau. Oleh itu, HMT berhak untuk memberikan ganti rugi sebanyak RM10,000. HMT telah dengan betulnya mendapati tuntutan perbelanjaan perubatan disokong oleh eksibit-eksibit dan tiada sebab utuk jumlah ganti rugi khas yang dibenarkan HMT iaitu RM14,470 diubah. Mengenai ganti rugi teruk pula, HMT juga telah dengan betulnya menolak ganti rugi ini. Adalah didapati kejadian yang menimpa plaintif bukanlah sesuatu yang dirancang untuk mencederakan perasaan plaintif. Defendan pertama tidak mengenali plaintif. Tidak ada keterangan apakah motif defendan pertama menembak plaintif. HMT dengan betul juga mendapati plaintif tidak boleh mengaut keuntungan dari tindakan tidak berperikemanusiaan defendan pertama (lihat perenggan 45, 49 & 51–55).

(5) **(oleh Gunalan Muniandy HMR, menentang)** Bagi prinsip liabiliti

vikarius yang akan digunakan terhadap perayu sebagai majikan pelaku tort (D1), harus ada penemuan khusus oleh mahkamah bicara bahawa D1 telah melakukan perbuatan salah dalam bidang undang-undang tort walaupun, seperti yang didedahkan oleh keterangan, dia mungkin telah melakukan perbuatan jenayah berat. Responden nampaknya telah membuat kesimpulan sendiri bahawa perbuatan salah D1 pada hari berkenaan adalah perbuatan yang menyalahi undang-undang di bawah undang-undang tort. Tidak ada sebarang permohonan mengenai kesalahan tort yang telah dilakukan oleh D1 untuk permohonan liabiliti vikarius, yang semata-mata merupakan konsep tort, untuk dipertahankan. Sekadar menyifatkan perbuatan itu sebagai satu perbuatan yang salah tanpa memohon apakah perbuatan tort yang mana majikan harus menanggung liabiliti adalah tidak memadai (lihat perenggan 59 & 65).

(6) **(oleh Gunalan Muniandy HMR, menentang)** Perbuatan jenayah D1 tidak ada kaitan sama sekali dengan menjalankan tugas atau perbuatan yang diberi kuasa oleh majikannya semasa bekerja. Begitu juga, perbuatannya melangkaui tindakan yang dibenarkan oleh majikannya atau secara nyata di luar jangkaan atau ramalan majikan. Ia juga jelas bahawa perbuatan itu tidak boleh dipertimbangkan secara logik dalam kuasa tersirat yang diberikan kepada D1 oleh D2. HMT telah gagal untuk menghargai fakta material yang sepatutnya diambil kira dalam menentukan sama ada liabiliti vikarius akan timbul terhadap D2. Perbuatan D1 melakukan aksi menembak terhadap pihak ketiga yang tidak mempunyai kaitan apa-apa dengan apa yang dia bekerja, iaitu untuk menyediakan perkhidmatan pengawal peribadi kepada pelanggan tertentu, tidak boleh dianggap, dengan apa-apa bahasa, ketika dalam perkhidmatan pekerjaan dan untuk perniagaan majikan (D2) (lihat perenggan 78–79 & 86).

(7) **(oleh Gunalan Muniandy HMR, menentang)** Keputusan HMT untuk memutuskan D2 bertanggungjawab secara vikarius adalah jelas tidak betul kerana ia melanjutkan liabiliti majikan untuk tindakan pekerja yang tidak berkaitan dan tidak wajar yang melebihi parameter dan had yang diiktiraf liabiliti tersebut. Oleh itu, HMT telah membuat penemuan mengenai liabiliti D2 yang jelas salah pada prinsipnya dengan menggunakan pendekatan yang salah dan menggunakan ujian yang telah ditetapkan secara tidak betul seperti yang dirujuk dalam penentuan liabiliti majikan untuk perbuatan kakitangannya yang tidak dapat dinafikan bertentangan dengan perniagaan majikan (lihat perenggan 87–88).

[English summary

The first defendant was a worker hired or employed by the appellant ('the second defendant') based on a service contract between them. The second

defendant had assigned the first defendant as a personal security guard to an individual known as Dato' Ong Teik Kwang. To enable the first defendant to carry out his duties, the second defendant supplied the first defendant with an automatic pistol. On 1 December 2016, the first defendant used the gun and shot Dato' Ong Teik Kwang dead in a car. After that, the first defendant got out of the car and opened fire on civilians who were passing through the Tun Dr Lim Chong Eu Highway in Penang, causing two people to die and four people to be seriously injured. The respondent ('plaintiff') was riding a motorcycle with his friend as a pillion rider at the scene of the incident and he saw an incident like a road accident. The plaintiff got off his motorcycle and approached an individual who was suspected of being a victim of a road accident as his body was covered in blood. The victim was sitting on the road. The first defendant was standing facing the victim. The plaintiff had asked the first defendant what had happened. Suddenly, the first defendant took out a firearm and fired one shot into the plaintiff's chest. The plaintiff fell on the road and was seriously injured. The first defendant was arrested by the police and charged with murder and attempted murder. The plaintiff who suffered injuries and damages as a result of being shot by the first defendant said the second defendant as the first defendant's employer was vicariously liable for the wrongdoing of the first defendant. The plaintiff claimed general and special damages against the second defendant. The second defendant denied liability. At the material time, the second defendant contracted with a company North Metal Sdn Bhd ('North Metal') to provide bodyguard services. The first defendant, as a certified bodyguard was handpicked by North Metal to work with them. North Metal itself had specifically designated the first defendant as a bodyguard to the individuals it designated. The High Court judge ('HCJ') had allowed the plaintiff's claim against the second defendant. Hence, this appeal by the appellant.

Held, dismissing the appeal:

(1) **(per Abu Bakar Jais JCA, majority)** When the first defendant refused to give any evidence in the High Court, despite being given the opportunity to do so, the HMT had correctly accepted the testimony of the plaintiff and the investigating officer that the plaintiff had been shot by the first defendant. The second defendant was the first defendant's employer and had paid the first defendant's wages. The second defendant had also supplied the pistol to the first defendant. Accordingly, it was incorrect that the second defendant's duty of care had been transferred or delegated to North Metal. Therefore, the second defendant should not be exempted from being vicariously liable for the first defendant's act of shooting the plaintiff (see paras 31 & 33).

(2) **(per Abu Bakar Jais JCA, majority)** Although no order was made by the High Court against the first defendant and the plaintiff himself did not apply for any order against the first defendant, this did not mean that the

second defendant could not be found vicariously liable. It was also wrong to argue that no liability could be transferred from the first defendant to the second defendant. Liability was not transferred from the first defendant to the second defendant. Vicarious liability against the second defendant indeed existed when it was proven that the first defendant's wrongdoing was that of shooting the plaintiff. The first defendant worked for the second defendant. Therefore, the first defendant was not an independent contractor. It could not be said that the first defendant's act of shooting the plaintiff was beyond the scope of his duties. Indeed, the first defendant was not ordered to shoot the plaintiff but the act of shooting was closely related to his work for which the gun was supplied. Nor could it be said that there was no vicarious liability because the first defendant acted in a 'frolic of his own'. This was because the plaintiff's shooting was related to the first defendant's duties and he used a gun supplied to him by the second defendant. It was incorrect to argue that the second defendant's duty of care and responsibility was only towards the first defendant's selection for their customers and not the first defendant's selection for the public. This was not directly consistent with the concept or law of vicarious liability. Even if it was true that the second defendant was careful when contracting with the first defendant, this did not mean that vicarious liability could not be imposed on the second defendant. The argument that the Security and Public Order Division at the Ministry of Home Affairs had found that the second defendant did not commit any wrongdoing in the shooting incident of the plaintiff could not help the second defendant. This was because the Division did not consider whether the second defendant was vicariously liable or not (see paras 35–42).

(3) **(per Abu Bakar Jais JCA, majority)** There was no contributory negligence simply because the plaintiff had asked what had happened. The plaintiff at that time did not know that the first defendant had shot several people and the action of the plaintiff asking what had happened was a normal act that could be done by the public concerned about an incident that happened. The HMT had correctly found the second defendant vicariously liable for the acts of the first defendant for having breached the duty of care towards the plaintiff and the public (see paras 43–44).

(4) **(per Abu Bakar Jais JCA, majority)** The HMT was correct in determining the amount of damages to be paid by the second defendant. As for general damages for bodily injury, the findings of fact by the HMT should not be disturbed. The HMT had correctly allowed a reasonable compensation according to him which was RM40,000. As for post-traumatic stress disorder, the HMT was entitled to give a reasonable amount of compensation in his opinion, which was RM30,000. The HMT also correctly awarded special damages. The plaintiff's claim was

supported by a sick leave certificate and oral evidence from his employer. Therefore, the HMT was entitled to provide damages amounting to RM10,000. The HMT had correctly found that the medical expenses claim was supported by the exhibits and there was no reason for the amount of special damages allowed by the HMT which was RM14,470 to be changed. As for severe damages, the HMT had also correctly rejected these damages. It was found that the incident that happened to the plaintiff was not something planned to hurt the plaintiff. The first defendant did not know the plaintiff. There was no evidence as to what the first defendant's motive was for shooting the plaintiff. The HMT also correctly found that the plaintiff could not profit from the first defendant's inhumane actions (see paras 45, 49 & 51–55).

(5) **(per Gunalan Muniandy JCA, dissenting)** For the principle of vicarious liability to be invoked against the appellant as the employer of the tortfeasor (D1), there must be a specific finding by the trial court that D1 had committed a wrongful act within the realm of the law of torts notwithstanding that, as the evidence disclosed, he may have committed a grave criminal act. The respondent appeared to have made his own conclusion that D1's wrongful act on the day in question was an unlawful act under the law of torts. There was no plea whatsoever of the tortious wrong that D1 had committed for the plea of vicarious liability, which was purely a tortious concept, to be sustainable. Merely describing the act as a wrongful act without pleading what was the tortious act for which that employer should bear liability would not suffice (see paras 59 & 65).

(6) **(per Gunalan Muniandy JCA, dissenting)** D1's criminal acts had no connection whatsoever to carrying out his duties or acts authorised by his employer in the course of employment. Likewise, his acts went far beyond acts authorised by his employer or were manifestly beyond the employer's foreseeability or anticipation. It was similarly obvious that the acts could not logically to be considered within the implied authority granted to D1 by D2. The HCJ had failed to judicially appreciate the material facts that she should had necessarily taken into account in the determination of whether vicarious liability would arise against D2. D1's act in going on a shooting spree at third parties who had no connection whatsoever with what he was employed to do, ie to provide personal bodyguard service to a specific client, could not be considered, by any stretch of language, to be in the course of the employment and for the business of the employer (D2) (see paras 78–79 & 86).

(7) **(per Gunalan Muniandy JCA, dissenting)** The HCJ's decision to hold D2 vicariously liable was plainly incorrect as it extended the employer's liability for an unconnected and unwarranted act of an employee beyond the recognised parameters and limits of that liability. Therefore, the HCJ had come to a finding on D2's liability that was plainly wrong in principle

by adopting an erroneous approach and incorrectly applying the established test as alluded to in the determination of an employer's liability for an act of his servant that was indisputably contrary to the former's business (see paras 87–88).]

Kes-kes yang dirujuk

Bernard v Attorney General [2005] 2 LRC 561, PC (dirujuk)
Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor [2001] 6 MLJ 497; [2001] 3 AMR 3260, MT (dirujuk)
Dr Yusuff bin Hj Mansur v Changkat Jering Sdn Bhd & Anor [1997] 5 MLJ 530; [1997] 3 CLJ Supp 211, MT (dirujuk)
Hilton v Thomas Burton (Rhodes) Ltd and another [1961] 1 WLR 705 (dirujuk)
Keppel Bus Company Ltd v Sa'ad bin Ahmad [1974] 1 MLJ 191, PC (dirujuk)
Lister and others v Hesley Hall Ltd [2001] 2 All ER 769, HL (dirujuk)
Loo Chooi Gaik v Dr Loh Lay Soon [2018] 1 LNS 2146, MR (dirujuk)
Maha Devi a/p Elia Perumal & Anor v Muhammad Zawawi bin Zabidi & Anor [2016] 1 PIR 53 (dirujuk)
Mohd Noorusallam bin Md Saad v Jamaluddin bin Desa [2016] 1 PIR 42 (dirujuk)
Mohd Saiful Basri bin Saffie v Amran bin Ismail & Anor [2016] 1 PIR 9 (dirujuk)
Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337, MT (dirujuk)
Samin bin Hassan v Government of Malaysia [1976] 2 MLJ 211, MP (dirujuk)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, MP (dirujuk)

Undang-undang yang dirujuk

Kanun Keseksaan s 302

Rayuan daripada: Guaman Sivil No PA-23NCvC-20–06 Tahun 2018 (Mahkamah Tinggi Malaya, Pulau Pinang)

Mohamad Nor Azam Rashid bin Zainol Rashid (Samry bin Masri bersamanya) (Azam Rashid & Co) bagi pihak perayu.
Simon Murali (Kok Yuen Lin bersamanya) (Simon Murali & Co) bagi pihak reponden.

Abu Bakar Jais HMR (menyampaikan penghakiman mahkamah majoriti):

PENGENALAN

[1] Ini adalah rayuan oleh perayu terhadap keputusan yang diberikan oleh Mahkamah Tinggi. Perayu merupakan defendan kedua di Mahkamah Tinggi.

Selepas ini perayu akan dirujuk sebagai defendan kedua dan pihak-pihak lain dirujuk sebagaimana mereka dirujuk di Mahkamah Tinggi.

[2] Di Mahkamah Tinggi, defendan pertama telah enggan memberikan apa-apa keterangan walaupun telah diberikan peluang berbuat demikian.

LATAR BELAKANG FAKTA

[3] Mengenai latar belakang kes, tiada sebab untuk tidak bersetuju dengan fakta ringkas yang telah dinyatakan oleh hakim Mahkamah Tinggi ('HMT') seperti di bawah.

[4] Defendan pertama ialah pekerja yang diupah atau digajikan oleh defendan kedua berdasarkan kontrak perkhidmatan antara mereka.

[5] Defendan kedua telah menugaskan defendan pertama sebagai pengawal keselamatan peribadi kepada seorang individu yang dikenali sebagai Dato' Ong Teik Kwang. Untuk membolehkan defendan pertama melaksanakan tugasnya, defendan kedua telah membekalkan kepada defendan pertama dengan sepucuk pistol automatik jenis 'Glock'. Pada masa yang material, defendan kedua adalah pemilik berdaftar dan pemegang lesen bagi pistol tersebut.

[6] Pada 1 Disember 2016 defendan pertama telah menggunakan pistol ini untuk menembak plaintif. Pada tarikh tersebut, lebih kurang beberapa minit sebelum kejadian yang menimpa plaintif berlaku, defendan pertama berada di dalam kereta jenis BMW dengan nombor pendaftaran PWF 11 ('kereta tersebut') yang dipandu oleh Dato' Ong Teik Kwang sendiri.

[7] Defendan pertama telah menggunakan pistol tersebut dan menembak mati Dato' Ong Teik Kwang. Selepas itu, defendan pertama telah turun dari kereta tersebut sambil melepaskan tembakan terhadap orang-orang awam yang melalui Lebuhraya Tun Dr Lim Chong Eu di Pulau Pinang dan menyebabkan dua orang individu telah meninggal dunia dan empat orang cedera parah. Kesemuanya, defendan pertama melepaskan 17 das tembakan dalam masa lima minit.

[8] Dua individu yang meninggal dunia ialah:

(a) Senthill Murugiah (No K/P: 780515–75–5059); dan

(b) Choi Hon Ming (No K/P: 840221–07–5391)

[9] Empat mangsa yang cedera parah ialah:

(a) Lee Hong Boon (No K/P: 600807–07–5513);

(b) Nurul Huda bt Abdul Aziz (No K/P: 831220–07–5352);

(c) Dr Arivarni Krishnan (No K/P: 831220–07–5686); dan

(d) Lim Boon Leng (No K/P: 840625–14–6205).

[10] Pada tarikh tersebut, lebih kurang pukul 7.15 malam, semasa plaintif sedang menunggang motosikal dengan rakannya sebagai pembonceng di Lebuhraya Tun Dr Lim Chong Eu menghala ke Jambatan Pulau Pinang, beliau ternampak satu kejadian seperti kemalangan jalanraya.

[11] Plaintif turun dari motosikalnya dan mendekati seorang individu yang disangka sebagai mangsa kemalangan jalanraya memandangkan badannya berlumuran darah. Mangsa tersebut berada dalam keadaan duduk di atas jalanraya. Defendan pertama sedang berdiri berhadapan dengan mangsa.

[12] Plaintif telah bertanya kepada defendan pertama apa yang telah berlaku. Defendan pertama telah membalas dengan berkata 'Hang nak apa?'.

[13] Tiba-tiba, defendan pertama telah mengeluarkan senjata api lalu melepaskan satu das tembakan ke bahagian dada plaintif. Plaintif jatuh di atas jalan dan mengalami cedera parah.

[14] Defendan pertama telah ditangkap oleh polis dan telah dituduh dengan kesalahan membunuh dan cubaan membunuh.

TUNTUTAN PLAINTIF DAN PEMBELAAN DEFENDAN KEDUA

[15] Juga, tiada sebab untuk mempertikaikan tuntutan plaintif dan pembelaan defendan kedua secara ringkas seperti yang didapati oleh HMT. Diturunkan dibawah tuntutan plaintif dan pembelaan defendan kedua tersebut.

[16] Plaintif yang mengalami kecederaan dan kerugian akibat ditembak oleh defendan pertama mengatakan defendan kedua sebagai majikan defendan pertama adalah bertanggungan secara vikarius terhadap perbuatan salah defendan pertama. Plaintif menuntut ganti rugi am dan khas terhadap defendan kedua.

[17] Defendan kedua pula menafikan liabiliti dan membangkitkan antara lainnya pembelaan berikut:

(a) perbuatan defendan pertama menembak plaintif bukanlah skop pekerjaan defendan pertama;

A (b) plaintif sendiri cuai bila mendekati defendan pertama; dan

(c) tanggungjawab berhati-hati defendan kedua telah berpindah atau diwakilkan kepada syarikat North Metal Industrial Sdn Bhd.

B **[18]** Pada masa yang material juga, defendan kedua telah berkontrak dengan sebuah syarikat yang dikenali sebagai North Metal Sdn Bhd ('North Metal') untuk menyediakan perkhidmatan pengawal peribadi.

[19] Defendan pertama, sebagai pengawal peribadi yang bertauliah telah C dipilih sendiri oleh North Metal untuk bertugas dengan mereka.

[20] North Metal sendiri yang telah secara khusus menetapkan defendan pertama sebagai pengawal peribadi kepada individu yang ditetapkannya.

D **[21]** Tugas untuk berhati-hati defendan kedua telah diwakilkan dan/atau berpindah (*delegable*) kepada North Metal.

[22] Defendan kedua juga membuat pembelaan bahawa plaintif telah gagal E bertindak secara munasabah untuk melindungi dirinya apabila turun dari motosikal dan mendekati defendan pertama walaupun beliau sedia maklum dan sedar keadaan yang berlaku.

[23] Senjata api juga telah dibekalkan kepada defendan pertama selepas F defendan pertama:

(a) lulus Tapisan Keselamatan oleh Kementerian Dalam Negeri (KDN);

(b) lulus ujian air kencing dan lulus sesi temuduga dengan Polis Diraja Malaysia;

G (c) mendapat surat kebenaran membawa dan menggunakan senjata api dan peluru dari Polis Diraja Malaysia; dan

(d) menjalani latihan menembak untuk dibekalkan dan membawa senjata tersebut.

H **[24]** Pembelaan lain ialah defendan kedua tidak pernah mengarahkan dan/atau membenarkan defendan pertama untuk melepaskan tembakan terhadap orang awam atau plaintif secara khususnya. Kejadian tembak adalah perbuatan salah laku oleh defendan pertama sendiri yang bertentangan dengan I skop tugasnya.

[25] Kecederaan yang dialami oleh plaintif bukanlah berlaku semasa defendan pertama menjalankan kerja-kerjanya dan/atau di dalam skop pekerjaan defendan pertama.

[26] Defendan kedua telah mematuhi segala peraturan, syarat-syarat serta arahan yang dikeluarkan oleh Polis Diraja Malaysia dan dengan itu, defendan kedua tidak bertanggungan terhadap tuntutan plaintif.

KEPUTUSAN HMT

[27] HMT telah membenarkan tuntutan plaintif terhadap defendan kedua dan menyatakan bahawa liabiliti vikarius bermaksud seseorang majikan itu akan bertanggungan untuk perbuatan pekerjanya yang dilakukan semasa menjalankan pekerjaannya. Liabiliti tersebut menurut HMT timbul dalam keadaan berikut:

(a) perbuatan salah yang dilakukan tidak dibenarkan oleh majikan; dan

(b) perbuatan salah yang dilakukan tidak dibenarkan oleh majikan, tetapi perbuatan salah itu adalah berkait rapat (*are so connected*) dengan perbuatan salah yang dibenarkan.

[28] HMT telah merujuk kepada kes *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 6 MLJ 497; [2001] 3 AMR 3260; dan *Lister and others v Hesley Hall Ltd* [2001] 2 All ER 769.

[29] HMT juga menyatakan ujian yang digunapakai untuk menentukan liabiliti vikarius ialah perbuatan salah yang dilakukan oleh seseorang pekerja itu mestilah berkaitan dengan jenis pekerjaannya.

[30] Menerimapakai prinsip undang-undang yang dinyatakan dalam kes-kes di atas, HMT telah memutuskan bahawa defendan kedua adalah bertanggungan secara vikarius untuk perbuatan salah yang dilakukan oleh defendan pertama terhadap plaintif. Dalam mencapai keputusan tersebut, HMT mengambilkira fakta-fakta berikut:

(a) defenden kedua menjalankan perniagaan menyediakan perkhidmatan pengawal peribadi bersenjata; dan

(b) defendan kedua adalah pemilik berdaftar senjata api.

KEPUTUSAN MAHKAMAH INI

[31] Apabila defendan pertama enggan memberikan apa-apa keterangan di Mahkamah Tinggi, walaupun diberikan peluang untuk berbuat demikian, HMT telah dengan betul menerima keterangan plaintif dan pegawai penyiasat (PW3) bahawa plaintif telah ditembak oleh defendan pertama. Juga berdasarkan kes *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 yang dirujuk oleh HMT, jika keterangan diberikan

sekali pun oleh defendan pertama, ia akan menguatkan lagi kes plaintif. Perbuatan defendan pertama menembak plaintif adalah satu yang salah. Ini merupakan dapatan HMT seperti yang dinyatakan beliau di ms 12 alasan bertulis beliau. Perbuatan ini juga adalah berkait rapat dengan tugas defendan pertama sebagai pengawal keselamatan peribadi kerana dia disediakan pistol oleh defendan kedua. Defendan kedua semestinya bertanggungan secara vikarius kerana apa yang disebutkan di dalam kes Privy Council, *Bernard v Attorney General* [2005] 2 LRC 561 seperti berikut:

> The correct approach was to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort and to ask whether, looking at the matter in the round, it was just and reasonable to hold the employer vicariously liable. A relevant factor was the risks to others created by an employer who entrusted duties, tasks and functions to an employee.

[32] HMT juga telah dengan betulnya menyatakan defendan kedua bertanggungan secara vikarius dengan merujuk kepada kes *Lister and others v Hesley Hall Ltd* [2001] 2 All ER 769 yang menyatakan seperti berikut:

> ... Just as an employer may be vicariously liable for deliberate and criminal conduct on the part of his employee, so he may be vicariously liable for acts of the employee which he has expressly forbidden him to do. So it is no answer to say that an employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty.

[33] Tidak boleh dikatakan juga bahawa defendan kedua tidak bertanggunggan secara vikarius semata-semata kerana North Metal yang telah memilih defendan pertama untuk ditempatkan bekerja dengan defendan kedua. Hakikatnya defendan kedua merupakan majikan defendan pertama dan telah membayar gaji defendan pertama. Defendan kedua juga telah membekalkan pistol tersebut kepada defendan pertama. Dengan itu, tidak benar bahawa tanggungjawab berhati-hati defendan kedua telah berpindah atau diwakilkan kepada North Metal. Oleh itu, defendan kedua tidak seharusnya terlepas dari bertanggungan secara vikarius kerana perbuatan defendan pertama menembak plaintif.

[34] Di peringkat ini pula, akan disentuh tiap-tiap perkara yang dibangkitkan dalam memorandum rayuan dan dapatan rayuan adalah seperti dinyatakan di bawah. Walaupun begitu ada perkara yang bertindih disebut dalam memorandum rayuan tersebut ('duplication'). Jadi, perkara yang bertindih, akan hanya dirujuk sekali saja.

[35] Pertamanya, walaupun tiada perintah dibuat oleh Mahkamah Tinggi terhadap defendan pertama dan plaintif sendiri tidak memohon apa-apa

perintah terhadap defendan pertama, ini tidak bermakna defendan kedua tidak boleh didapati bertanggungan secara vikarius. Ini kerana hakikatnya perbuatan salah, iaitu menembak plaintif telah dibuktikan dilakukan oleh defendan pertama terhadap plaintif. Oleh yang demikian, defendan kedua boleh didapati bertanggungan secara vikarius terhadap perbuatan salah defendan pertama.

[36] Juga adalah salah untuk dihujahkan bahawa tiada tanggungan boleh dipindahkan dari defendan pertama ke defendan kedua. Tidak timbul isu liabiliti dipindahkan dari defendan pertama kepada defendan kedua. Tanggungan liabiliti bukan dipindahkan dari defendan pertama ke defendan kedua. Tanggungan liabiliti secara vikarius terhadap defendan kedua sememangnya wujud apabila dibuktikan perbuatan salah defendan pertama iaitu menembak plaintif. Tanggungan vikarius ini wujud tanpa perlu didapati defendan pertama juga didapati bertanggungan.

[37] Juga, defendan pertama bukan kontraktor bebas kepada defendan kedua. Hakikatnya pistol itu dibekalkan oleh defendan kedua kepada defendan pertama. Juga, defendan pertama berkerja untuk defendan kedua. Oleh itu defendan pertama bukan kontraktor bebas.

[38] Juga, tidak boleh dikatakan perbuatan defendan pertama menembak plaintif adalah di luar skop bidang tugasnya. Sememangnya defendan pertama tidak diperintahkan menembak plaintif tetapi perbuatan menembak itu berlaku adalah berkait rapat dengan kerjanya yang dibekalkan pistol tersebut. Jika perbuatan menembak plaintif ini dianggap di luar skop tugasnya, maka tidak akan wujud konsep tanggungan vikarius.

[39] Juga tidak boleh dikatakan tiada tanggungan vikarius kerana defendan pertama bertindak secara 'frolic of his own'. Ini kerana perbuatan menembak plaintif itu adalah berkait dengan tugas defendan pertama dan beliau menggunakan pistol yang dibekalkan kepadanya oleh defendan kedua.

[40] Juga adalah tidak benar untuk dihujahkan bahawa tugas berhati-hati dan tanggung jawab defendan kedua hanya terhadap pemilihan defendan pertama untuk pelanggan-pelanggan mereka dan bukan pemilihan defendan pertama untuk orang awam. Ini tidak langsung konsisten dengan konsep atau undang-undang liabiliti vikarius. Jika ini diterima, maka tidak ada tanggungan vikarius akan pernah terjadi.

[41] Seterusnya menyentuh pula perkara yang dibangkitkan juga di dalam memorandum rayuan iaitu defendan kedua telah berhati-hati apabila berkontrak dengan defendan pertama. Walaupun jika benar sekalipun bahawa defendan kedua telah berhati-hati apabila berkontrak dengan defendan

pertama, ini tidak bermakna tanggungan vikarius tidak boleh dikenakan terhadap defendan kedua. Sememangnya tanggungan vikarius akan melibatkan pihak ketiga, bukan saja pekerja (defendan pertama) dan majikan (defendan kedua) tetapi juga pihak ketiga (plaintif). Jika tiada pihak ketiga maka tidak akan wujud konsep atau undang-undang tanggungan vikarius.

[42] Berkenaan hujahan bahawa Jabatan Keselamatan Dan Ketenteraman Awam di Kementerian Dalam Negeri telah mendapati bahawa defendan kedua tidak melakukan sebarang kesalahan terhadap insiden menembak plaintif, kami berpendapat ini tidak dapat membantu defendan kedua. Ini kerana Jabatan tersebut tidak menimbangkan sama ada defendan kedua bertanggungan secara vikarius atau tidak. Tuntutan plaintif berkenaan tanggungan vikarius ini sudah tentunya bukan perkara yang ditimbangkan oleh Jabatan tersebut.

[43] Seterusnya tiada kecuaian sumbangan (*contributory negligence*) di pihak plaintif. Apabila plaintif nampak defendan pertama setelah kejadian tembak terhadap orang lain, defendan pertama ingat bahawa kejadian itu adalah kemalangan jalanraya. Jadi plaintif telah bertanya secara spontan kepada defendan pertama apa yang telah terjadi. Defendan pertama kemudiannya bertanya kepada plaintif — 'Hang nak apa?' dan kemudian menembak plaintif. Kami dapati tiada kecuaian sumbangan (*contributory negligence*) semata-mata kerana plaintif telah bertanya apa yang telah terjadi. Plaintif waktu itu tidak tahu bahawa defendan pertama telah menembak beberapa orang dan tindakan plaintif menanyakan apa yang telah terjadi adalah suatu perbuatan biasa yang boleh dilakukan oleh orang ramai yang prihatin terhadap sesuatu kejadian yang berlaku.

[44] Juga, HMT telah dengan betulnya mendapati defendan kedua bertanggungan secara vikarius terhadap perbuatan defendan pertama kerana telah memungkiri tugas hati-hati terhadap plaintif dan orang awam. Seperti yang dinyatakan, perbuatan defendan pertama menembak plaintif telah dibuktikan. Oleh itu, defendan kedua semestinya bertanggungan secara vikarius kerana perbuatan defendan pertama.

GANTI RUGI

[45] Kami juga mendapati bahawa HMT adalah betul dalam menentukan jumlah ganti rugi yang perlu dibayar oleh defendan kedua. Bagi ganti rugi am ke atas kecederaan tubuh badan, penemuan fakta-fakta oleh HMT tidak seharusnya diganggu.

[46] HMT telah dengan betul mendapati akibat terkena satu das tembakan di bahagian dada, plaintif mengalami kecederaan berikut:

(a) *gun shot wound with left lung contusion*;

(b) *fracture of left third and fourth ribs with haemopneumothorax*;

(c) *communited fracture of left scapula*;

(d) *left ulnar nerve palsy secondary to traumatic injury*; dan

(e) *multiple scars*.

[47] Tiada sebab juga untuk menggangu dapatan HMT bahawa akibat kecederaan-kecederaan yang disebutkan di atas, tangan kiri plaintif menjadi lemah. Beliau tidak boleh menggerakkan dan menggenggam tangan kirinya secara bebas, tidak boleh mengangkat barang berat serta menjejaskan pekerjaannya.

[48] HMT juga telah menyatakan untuk kecederaan ini, peguamcara plaintif mencadangkan award RM50,000 dengan merujuk kepada kes-kes berikut:

(a) *Mohd Saiful Basri bin Saffie v Amran bin Ismail & Anor* [2016] 1 PIR 9;

(b) *Mohd Noorusallam bin Md Saad v Jamaluddin bin Desa* [2016] 1 PIR 42 di ms 330; dan

(c) *Maha Devi a/p Elia Perumal & Anor v Muhammad Zawawi bin Zabidi & Anor* [2016] 1 PIR 53 di ms 453.

[49] HMT dengan betul juga telah membezakan semua fakta kes di atas dengan menyatakan plaintif dalam kes-kes di atas telah mengalami kecederaan yang lebih serius. Sementara di dalam kes di hadapan HMT, plaintif tidak mengalami lumpuh (*total paralysis*). Oleh itu HMT dengan betul telah membenarkan ganti rugi yang munasabah menurut beliau iaitu RM40,000. Tiada sebab juga untuk ganti rugi ini diubah.

[50] Bagi *post traumatic stress disorder* pula, HMT membuat dapatan fakta akibat kejadian yang menimpanya, plaintif mengalami post traumatic stress disorder. Plaintif telah diperiksa oleh pakar sakit jiwa, Dr Zasmanie Shafiee (PW1). HMT telah mengambil kira bahawa PW1 telah menyediakan satu laporan (P2) yang antara lainnya menyebut plaintif mengalami masaalah untuk tidur, enggan bercampur gaul dengan orang ramai dan cepat marah. Peguam plaintif berhujah bahawa post traumatic stress disorder ini adalah kesan semulajadi yang menimpa ke atas mangsa tembak. Untuk post traumatic stress disorder ini, HMT juga telah menyatakan peguam plaintif telah mencadangkan award RM750,000 dengan merujuk kepada kes-kes berikut:

(a) *Dr Yusuff bin Hj Mansur v Changkat Jering Sdn Bhd & Anor* [1997] 5 MLJ 530; [1997] 3 CLJ Supp 211; dan

(b) *Loo Chooi Gaik v Dr Loh Lay Soon* [2018] 1 LNS 2146.

[51] HMT telah mendapati dalam setiap kes yang dirujuk di atas, mahkamah memberikan award RM90,000, masing-masing kepada plaintif yang mengalami 'manic depressive psychosis' dan 'mental anguish'. Oleh itu setelah membuat perbandingan kes-kes di atas dengan kes di hadapannya, HMT mendapati plaintif tidak mengalami masaalah mental yang serius seperti dalam kedua-dua kes tersebut. Penemuan fakta ini tidak boleh diganggu sewenang-wenangnya. Oleh itu HMT berhak memberikan jumlah ganti rugi yang munasabah pada pendapat beliau iaitu RM30,000.

[52] HMT juga telah dengan betul memberikan ganti rugi khas. Mengenai ganti rugi khas berkenaan kehilangan pendapatan, HMT mendapati bahawa semasa kejadian, plaintif bekerja sebagai jurukamera RTM dengan gaji purata sebanyak RM3,550 sebulan. Plaintif telah tidak boleh bekerja selama tiga bulan dan tidak dibayar gaji. Plaintif telah menghadkan tuntutannya kepada RM10,000 sahaja. HMT mendapati tuntutan plaintif disokong oleh sijil cuti sakit dan keterangan lisan dari majikan beliau. Oleh itu, HMT berhak untuk memberikan ganti rugi sebanyak RM10,000.

[53] Untuk perbelanjaan perubatan pula, HMT telah dengan betulnya mendapati tuntutan perbelanjaan perubatan ini disokong oleh ekshibit-ekshibit berikut:

P3 dan P4	–	RM2,500
P14(a), (b), (c) dan (d)	–	RM160
P15(a) dan (b)	–	RM1,000
P16(a), (b), (c) dan (d)	–	RM810
Jumlah	–	RM4,470

[54] Oleh itu tiada sebab utuk jumlah ganti rugi khas yang dibenarkan HMT iaitu RM14,470 diubah.

[55] Mengenai ganti rugi teruk pula, HMT juga telah dengan betulnya menolak ganti rugi ini. Dapatan fakta mengenai tuntutan ini tidak harus diganggu tanpa alasan yang kuat. HMT menolak ganti rugi teruk setelah mendapati kejadian yang menimpa plaintif bukanlah sesuatu yang dirancang untuk mencederakan perasaan plaintif. Defendan pertama tidak mengenali plaintif. Tidak ada keterangan apakah motif defendan pertama menembak plaintif. HMT dengan betul juga mendapati plaintif tidak boleh mengaut keuntungan dari tindakan tidak berperikemanusiaan defendan pertama.

KESIMPULAN

[56] Berdasarkan alasan-alasan yang diberikan, kami secara majoriti mendapati bahawa tiada alasan yang kukuh untuk tidak bersetuju dengan keputusan HMT. Kami mendapati juga alasan-alasan yang diberikan oleh HMT untuk mendapati defendan kedua bertanggungan secara vikarius adalah betul. Oleh itu keputusan HMT adalah dikekalkan dan rayuan defendan kedua adalah ditolak.

Gunalan JCA (delivering dissenting judgment of the court):

[57] I have duly read the majority judgment of this court ably written by my learned brother, Abu Bakar Jais JCA where the background facts and the finding of the learned High Court judge ('LHCJ') have been adequately set out. I, thus, do not propose to delve into the factual matrix of the case at hand but would focus on my reasons for holding that the LHCJ's decision to find the appellant vicariously liable for the wrongful act of the first defendant ('D1') was plainly erroneous in principle and in fact and warranted being reversed on appeal.

[58] As noted in the majority judgment, there was no dispute that the plaintiff/respondent had suffered serious injury and loss due to the act of D1 in firing a shot at him using a firearm supplied by the appellant, his employer of the material time. However, the dispute centred around whether under the facts and circumstances surrounding D1's wrongful act the appellant as his purported employer could be held vicariously liable to the plaintiff for the loss and damage that he had suffered caused by D1's act which the LHCJ merely described as wrongful without making any specific finding as to what tortious act he had committed for the plaintiff/respondent to invoke the principle of vicarious liability against the appellant.

[59] I am of the considered view that for the aforesaid principle to be invoked against the appellant as the employer of the tortfeasor ('D1'), there must be a specific finding by the trial court that D1 had committed a wrongful act within the realm of the law of torts notwithstanding that, as the evidence disclosed, he may have committed a grave criminal act. As correctly highlighted to us by the appellant, the plaintiff in the court below had vide his pleadings only prayed for reliefs and/or orders against the appellant ('D2') whereas against D1 no order or relief was sought. The appellant was also correct, in my view, in pointing out that the plaintiff, including during the submission before us, appeared to have made his own conclusion that D1's wrongful act on the day in question (1 December 2016) was an unlawful act under the law of torts. There was not even a plea for him to be found liable or any specific tort. I must pause here to reiterate that the LHCJ had made a mere general finding that D2

was liable vicariously to the plaintiff for D1's wrongful act.

[60] Neither had any evidence been given in the trial as to what was the wrongful act under the law of torts that D1 had committed in regard to the claim against D2. Be that as it may, to my mind, it is indisputable that in law it was incumbent upon the plaintiff to establish a tortious wrong by D1 for any tortious liablity to arise against D2 as the employer.

[61] An accurate definition of this kind of liablity is provided by the appellant's quotation from Legal Dictionary. Net as follows:

> Vicarious liability, sometimes referred to as 'imputed liability,' is a legal concept that assigns liability to an individual who did not actually cause the harm, but who has a specific superior legal relationship to the person who did cause the harm. Vicarious liability most commonly comes into play when an employee has acted in a negligent manner for which the employer will be held responsible.

[62] A perusal of the respondent's statement of claim is necessary to ascertain the act of D1 as pleaded for which it was claimed that D2 should be held vicariously liable.

[63] As the pleaded background facts leading to the incident where D1 alighted from the car, pulled out a firearm and fired at the plaintiff was not disputed, I would focus on the pleaded narrative in relation to D2's liability, as follows:

> *Vicarious Liability*
>
> 8. The plaintiff pleads that the Second defendant is vicariously liable for the wrongful act committed by the First defendant, which in this case was discharging the firearm towards the plaintiff and causing him serious injury.
>
> 8.1 The First defendant committed the act while and during the course of his employment under the Second defendant.

[64] It bears emphasis that D1's act has been pleaded merely as a wrongful act in discharging the firearm towards the plaintiff. It is abundantly clear that in the above paragraphs and all the other parts of the SOC concerning the shooting incident, there is no plea whatsoever of the tortious wrong that D1 had committed for the plea of vicarious liability, which is purely a tortious concept, to be sustainable. Merely describing the act as a wrongful act without pleading what is the tortious act for which that employer should bear liability would not suffice. This, to my mind, is not a proposition ground on mere labelling but goes to the substance of the liability sought to be imposed on the employer for the employee's act.

[65] For the record it was also pleaded that D1 was then facing several criminal charges, including for murder under s 302 of the Penal Code in consequence of his wrongful act during the incident. While there can be no doubt of overlapping between criminal acts and tortious wrongs, the point to be emphasised is the necessity for the tortious wrong to be expressly pleaded.

[66] Whether it is negligence or some other tortious wrong, it is plain that in principle there must be a clear finding by the trial court against the tortfeasor of the commission of a particular tort to trigger the employer's or superior's liablity. That this finding is crucial to sustain the plaintiff's claim is explicit in the Privy Council judgment in *Bernard v Attorney General* [2005] 2 LRC 561 that:

> The correct approach was to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort and to ask whether, looking at the matter in the round, it was just and reasonable to hold the employer vicariously liable. A relevant factor was the risks to others created by an employer who entrusted duties, tasks and functions to an employee.

[67] This court went on to hold by majority that the LHCJ had correctly found D2 vicariously liable by reliance on the ratio of *Lister and others v Hesley Hall Ltd* [2001] 2 All ER 769 which held that:

> Just as an employer may be vicariously liable for deliberate and criminal conduct on the part of his employee, so he may be vicariously liable for acts of the employee which he has expressly forbidden him to do. So it is no answer to say that an employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty.

[68] It is important to highlight the approach taken by the LHCJ in arriving at her conclusion that liablity arose against D2 for D1's wrongful act for these reasons:

(a) the impugned act was not authorised by his employer; and

(b) even though the act was not without the employer's approval, but the act was closely connected with the acts that were approved.

As such, that the employer would be vicariously liable for his employee's acts done in the course of the employee's employment. There was no careful examination by the LHCJ as required as to the closeness of connection between the said acts and his nature of employment.

[69] In view of how the LHCJ had arrived at her finding implicating the

employer, it is crucial for us to scrutinise whether on the facts and evidence before the trial court, the LHCJ had correctly applied the principles governing vicarious liability in reaching her decision holding the employer liable for a criminal act of the employee that appeared to be wholly unforeseeable. Had she correctly applied the test to determine vicarious liability by simply asking the question whether the wrongful act by the employee was closely connected to the latter's nature of work, she would not reasonably have arrived at the aforesaid finding on D2's liability considering that the act was plainly not pursuant to the duty that D1 was performing.

[70] In finding D2, liable, the LHCJ in essence placed emphasis on these facts:

(a) D2 was carrying out the business of providing armed personal bodyguard service; and

(b) D2 was the registered owner of the firearm used by D1 at the material time of the incident.

[71] While I would not touch on the issue of whether D2 could be absolved of liability on the ground that at the material time of the incident an independent contractor whose employment by D2 was specifically for D2's contract with North Metal and wholly to serve the latter, it is important to appreciate the terms of his service in relation to his scope of work. Subsequent to the contract of employment between D1 and D2, the latter entered into a contract with North Metal ('NM') which led to D1 being released to serve NM. Thereafter, it was NM who had authority and supervision over D1 to the exclusion of D2. Accordingly, his time and place of work and specific duties were on NM's instructions. In fact, the LHCJ acknowledged that at the material time D1 had already been placed under the control and supervision of NM.

[72] To my mind, the thrust of D2's contention that merited our serious consideration was that in acting as he did in causing grievous injury to the plaintiff, D1 had gone on a frolic of his own in that the wrongful act had no connection or bearing whatsoever with D1's nature and scope of duty. In a nutshell, the crucial question was whether the act was done not only during or in the course of his employment but for the business of his employer who, the plaintiff asserts, was still D2 and not NM.

[73] We have first to give due attention to the LHCJ's approach to the issue at hand. Briefly, her view was simply that D2 couldn't just avoid liability by saying that D1 had acted outside the scope of work as instructed or against D2's instructions. If the law were to recognise such a type of defence, all innocent victims would be left without a remedy. According to her, it was immaterial

that D2 had prohibited D1 the firearm entrusted to him as the English authorities strictly applied the principle relating to an employer's authority. Merely on this basis, this LHCJ appears to have reached the conclusion that any act of the employee regardless of whether it was 'his own frolic' would automatically incur liability for the employer as long as it was done during the course of his employment whether or not it was an approved or prohibited act in carrying out the employer's instructions.

[74] This statement or decision by the LHCJ, with respect, is, to my mind, wrong in principle amounting to misinterpretation of the relevant authorities and would open the floodgates of an employer's liability for any kind of act whatsoever by his employee without any regard to whether it had any connection to or was within the scope of work entrusted to the employee.

[75] Our attention was rightly drawn to a case squarely in point decided by the Federal Court, *Samin bin Hassan v Government of Malaysia* [1976] 2 MLJ 211 where it was remarked at p 213:

> He went on to express that one must look at the realities of the situation and having dealt with the facts concluded that:
>
> > This seems to me to be a plain case of what, in the old cases, was sometimes called going out on a frolic of their own. It had most tragic consequences; but it does not seem to me that it is possible to hold (though I would like to do so if I could), looking at the realities of the situation, that on the course of that journey the second defendant was doing anything that he was employed to do. It may be he was using his master's vehicle with his master's permission but as *Higbid v RC Hamnett Ltd* 49 TLR 104 shows, that is not enough. The true test is, was he doing something that he was employed to do? I think on the facts of this case, he plainly was not.

Further, that:

> The fact that first defendant was using respondent's land rover at the time of the accident does not automatically render respondent liable for negligence. See *Britt v Galmoye & Nevill* (1928) 44 TLR 294 and *Hewitt v Bonvin & Anor* [1940] 1 KB 188. Respondent would be liable if first defendant was driving the motor vehicle in the discharge of his duties of service.

[76] In the above case, the Federal Court adopted with approval the Privy Council judgment in *Keppel Bus Company Ltd v Sa'ad bin Ahmad* [1974] 1 MLJ 191 at pp 191–192 where the passage relevant to the instant facts states as follows:

> ... there was no evidence which would justify the ascription of the act of the conductor to any authority, express or implied, vested in him by the appellants. There was therefore no legal ground for holding that the facts of this case justify a

A departure from the ordinary rule of culpa tenet suos auctores.

The question in the case is whether the conductor did what he did 'in the course of his employment'. The course of the employment is not limited to the obligations which lie on an employee in virtue of his contract of service. It extends to acts done on the implied authority of the master.

B

It is necessary, accordingly, in the present appeal to examine the grounds upon which the learned judge held that, on the facts, this assault was committed in the course of carrying out, by a wrong mode, work which the conductor was expressly or impliedly authorised and therefore employed to do, and to see whether there is any evidence to support them. If there be no evidence, it is matter of law that his conclusions could not stand.

C

[77] Whether the wrongful act of an employee falls within his sphere of duties in a given case must depend on its own peculiar facts. Hence, it was D incumbent for the LHCJ to have duly addressed the issue of whether D1 did the act in furtherance of his duties to his employer. Regrettably, the LHCJ omitted to do so but went on to hold that D2 could not be absolved from liability by just saying that it was a prohibited act contrary to instruction. Though the series of criminal acts were done by D1 in the normal course of his E duties, the LHCJ had also failed to address her mind to the vital issue whether his obviously unauthorised acts had become so connected with his authorised acts that they had merely become differing modes of doing the latter.

F **[78]** It was patently evident in the instant case that D1's criminal acts had no connection whatsoever to carrying out his duties or acts authorised by his employer in the course of employment. Likewise, his acts went far beyond acts authorised by his employer or were manifestly beyond the employer's foreseeability or anticipation. It was similarly obvious that the acts cannot logically to be considered within the implied authority granted to D1 by D2 G This is a clear case of the employee having gone so far on his own frolic that no liability can be imposed on his employer for the losses and damages suffered by the victim.

H **[79]** In the circumstances, I am inclined to agree with the contention of the appellant that the LHCJ had failed to judicially appreciate the material facts that she should have necessarily taken into account in the determination of whether vicarious liability would arise against D2.

I **[80]** In deliberating on the correct test to be applied, the LHCJ rightly sought reliance on the Privy Council case of *Bernard v Attorney General* [2005] 2 LRC 561 at p 570 which held:

The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort and to ask whether

looking at the matter in the round, it is just and reasonable to hold the employers vicariously liable, in deciding the question, the relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions of an employee.

[81] She also considered the principle enunciated in *Lister and others v Hesley Hall Ltd* [2001] 2 All ER 769 where Lord Millet pronounced that:

> ... Just as an employer may be vicariously liable for deliberate and criminal conduct on the part of his employee, so he may be vicariously liable for acts of the employee which he has expressly forbidden him to do. So it is no answer to say that an employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty.

[82] A close examination is called for of the reasons advanced by the LHCJ for finding that there existed a close relationship between D1's unauthorised or prohibited act and his nature of work under D2's employement. Having noted that D1 was assigned to NM to serve as a personal bodyguard to NM's client (Dato' Tan) D2 had supplied him with a firearm which carried risks to innocent members of the public which D2 had to bear as a provider of that kind of service, ie, armed bodyguard service. D2, it was found, had given rise to a situation giving D1 the opportunity to use the firearm which was registered in his name. D1 discharged the firearm at the plaintiff while carrying out his duties as a bodyguard in the employment of D2.

[83] Having referred to the type of business undertaken by D2 and D1's nature of duty/work, the LHCJ concluded that there was a close connection between D1's wrongful act and his duties which would preclude D2 from contending that D1 had acted beyond his scope of work or contrary to D2's instructions. She took the position that considering that innocent victims may be left without a remedy if such a defence as proffered by D2 were to be accepted, the court must disregard the fact that D1 had used the firearm in a manner prohibited by his employer.

[84] With respect, the LHCJ seems to have laboured under a misapprehension that the mere provision of a firearm to the employee ('D1') to carry out the personal bodyguard duty entrusted to him would render D2 vicariously liable because the incident had a close relationship with the business of the employer which required him to carry a loaded firearm. This approach by the LHCJ was plainly contrary to the principle propounded in *Bernard v Attorney General* on the correct approach which is to concentrate on the particular tort and nature of the employment and to focus on the relative closeness of connection between the two to determine the principal question whether it would be reasonable to hold the employer liable for the tortious act as an incidental risk of the type of business it engaged in. From a plain reading

of the LHCJ's reasons for holding D2 liable, it was obvious that she had failed to adopt this approach notwithstanding the presence of ample evidence that throughout the incident D1 had gone on a rampage and frolic of his own by randomly opening fire at members of the public which went far beyond his scope of duties and implied authority as a personal bodyguard.

[85] Before concluding, I would reiterate that in the determination of the central question whether the LHCJ had erred in finding D2 liable for the unlawful and totally unanticipated act of D1, I must reiterate that the Federal Court in *Samin bin Hassan* had without qualification adopted the principle enunciated by Diplock J in *Hilton v Thomas Burton (Rhodes) Ltd and another* [1961] 1 WLR 705 and made it abundantly clear that a master would be made to shoulder the servant's liable only if 'at the material time the servant was acting in the course of the employment and for the employment and for the business of the employer'.

[86] In my considered view, D1's act in going on a shooting spree at third parties who had no connection whatsoever with what he was employed to do, ie to provide personal bodyguard service to a specific client, could not be considered, by any stretch of language, to be in the course of the employment and for the business of the employer (D2).

CONCLUSION

[87] By reason of the factors elaborated above, I would sum up that the LHCJ's decision to hold D2 vicariously liable in this instance was plainly incorrect as it extends the employer's liability for an unconnected and unwarranted act of an employee beyond the recognised parameters and limits of that liability.

[88] I, therefore hold, with respect to the LHCJ, that she had come to a finding on D2's liability that was plainly wrong in principle by adopting an erroneous approach and incorrectly applying the established test as alluded to in the determination of an employer's liability for an act of his servant that was indisputably contrary to the former's business.

Rayuan ditolak.

Dilaporkan oleh Ahmad Ismail Illman Mohd Razali